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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. [redacted] 74

GRINNELL CORPORATION,
Appellant,

against

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

JURISDICTIONAL STATEMENT OF GRINNELL CORPORATION.

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April 19, 1965.

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Opinion Below.

The opinion of the District Court (Appendix, *infra*, pp. 1a-34a) is reported at 236 F. Supp. 244.

Jurisdiction.

This is a civil action brought under Sections 1 and 2 of the Sherman Act.* The District Court's decree (Appendix, *infra*, pp. 35a-37a) was entered, along with its findings, conclusions and opinions, on November 27, 1964. Notice of

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* 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1958).

appeal was filed by Grinnell Corporation ("Grinnell") on January 25, 1965. Time to file this Jurisdictional Statement and docket this case on appeal was extended until April 19, 1965, by order of Mr. Justice Goldberg dated March 23, 1965.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 62 Stat. 989 (1948), 15 U. S. C. §29. *United States* v. *Singer Mfg. Co.*, 374 U. S. 174 (1963); *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945).

Statutes Involved.

Sections 1 and 2 of the Sherman Act* provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . Every person who shall make any [such] contract or engage in any [such] combination or conspiracy . . . shall be deemed guilty of a misdemeanor * * *.
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Questions Presented.

This case presents the following fundamental questions of substantive law and procedure:

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* 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1958).

1. Whether the defendants were accorded a fair trial and due process when the trial court:

(a) formed an unalterable judgment adverse to defendants both as to liability and remedy prior to hearing any evidence;

(b) announced prior to the trial that it would result in a decree far worse than plaintiff sought;

(c) mistakenly believed that the defendants had secured the disqualification of two prior judges and resented defendants' requests that he disqualify himself on account of his prejudgment of the case;

(d) conducted the trial as a "ceremonial act" and expedited the preordained result by such shortcuts as receiving all of the Government's proffered evidence *en masse*, without considering defendants' specific objections; and

(e) ordered relief which exceeded anything envisaged by the complaint or suggested by plaintiff.

2. Whether the District Court was correct in holding that defendants violated Section 1 of the Sherman Act by agreements "admittedly several decades old and formally no longer effective" which allegedly restrained trade among subsidiaries of a common parent corporation.

3. Whether the District Court was correct in holding that, once the Government has shown that a defendant has a "predominant" share of the relevant market, the defendant then has the burden of proving that it is innocent of any violation of Section 2 of the Sherman Act.

4. Whether the District Court correctly held that the relevant market in this case is "accredited central service protective systems operated by largely automatic devices" and does not include other protective services or devices.

5. Whether the District Court improperly held that Grinnell violated Sections 1 and 2 of the Sherman Act by making Grinnell vicariously liable for acts of its separately-operated subsidiaries in which Grinnell did not participate.

6. Whether the District Court erred in decreeing broad injunctions:

(a) prohibiting any defendant from ever employing in any capacity Mr. James Douglas Fleming, the President of Grinnell and not a party to this action;

(b) directing Grinnell to divest itself of its stock in all three other defendants (when Grinnell is in a different industry than they are, and is neither a supplier to, nor a purchaser from, any of them);

(c) enjoining future acquisitions in the designated market—thereby effectively prohibiting Grinnell from entering it; and

(d) prohibiting "further restraining trade" and "further attempting to monopolize", without any specification of the particular practices enjoined.

Statement.

The Pleadings

The complaint was filed over seven years after Grinnell had acquired a majority stock interest in defendants American District Telegraph Company, Automatic Fire Alarm Company of Delaware, and Holmes Electric Protective Company.* It charges that these alarm companies and Grinnell have violated Sections 1 and 2 of the Sherman

* Referred to herein as "ADT", "AFA" and "Holmes" respectively, and "the alarm companies" collectively.

Act by an unlawful combination and conspiracy to restrain and to monopolize interstate trade and commerce in rendering central station protective services (or "CSPS"). Its prayer for relief includes demands that Grinnell divest itself of its stock in ADT, and that ADT be divested of certain assets, including all manufacturing facilities for protection devices.

Grinnell's answer denies the basic charging allegations of the complaint and asserts as affirmative defenses that (a) CSPS is "local and intrastate in character" (¶26), (b) issues relating to the allegedly restrictive agreements are moot because of the expiration of the agreements and changed circumstances (¶27), and (c) plaintiff's prayer for divestiture by Grinnell of its ADT stock is lacking in equity because Grinnell withheld its acquisition of such stock until the Department of Justice concluded an investigation thereof and found no objection to it (¶¶28, 30).

The Business of the Parties.

Central station protective services are performed by installing electrical signaling devices on the premises of subscribers and connecting these devices via leased telephone wires to a central station. There, personnel are constantly on duty to receive signals indicating the possibility of fire, waterflow, holdup, burglary or other hazards (depending upon the type of the service being rendered) and to carry out appropriate protective measures.

The alarm company defendants have been rendering some form of central station protective services for more than fifty years, directly or through local subsidiaries (GX 313, 314, 315).* Grinnell is not in the CSPS business or in supplying products used in rendering such services. Instead, Grinnell sells various piping, plumbing and heat-

* As used herein, GX refers to the Government's Exhibits, GrX to Grinnell's Exhibits, and DX to exhibits of the other defendants.

ing products, some of which it manufactures, including automatic sprinkler systems.

Prior to 1954, Grinnell supplied certain of the devices (called "actuating devices") used in rendering a type of CSPS known as "sprinkler supervisory and waterflow alarm service" (referred to in the opinion below as "SSWF"). These devices, when connected to pipes leading to sprinklers on the premises of subscribers to SSWF services, are capable of detecting water flowing in those pipes and sending a signal to transmitters (not made by Grinnell) located on the premises, which in turn transmit the signal to the central station. These actuating devices were never a substantial part of Grinnell's business (GX 309, 316; GrX J5, J39; Tr. 689-90*), and Grinnell's manufacture of them was curtailed in 1954 (when ADT commenced to make them) and ceased entirely in 1961 (Tr. 722).**

Like other plumbing companies, Grinnell will, on request of CSPS companies, connect actuating devices manufactured by others to the lead pipes of sprinkler systems it installed on the premises of subscribers to sprinkler supervisory and waterflow alarm service.***

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* As used herein Tr. refers to the trial transcript except where the transcript reference is accompanied by the date of a pretrial hearing.

** Between 1907 and 1954, Grinnell designed, manufactured and installed these devices and in return received 25% of the revenues realized by AFA and ADT from SSWF service contracts with subscribers. Contrary to the finding of the court (Findings Nos. 17, 24, App. 12a-13a, 15a), Grinnell received no participation in revenues from new service contracts entered after 1954 (GX 316; Tr. 715, 720-724). In that year, pursuant to a program adopted years earlier, ADT commenced making its own actuating devices and using ADT-owned devices on new ADT jobs (Tr. 721-22).

*** ADT's practice is to request whatever sprinkler company installed the sprinkler system to install SSWF actuating devices at standard, non-discriminatory installation rates (DX E1; Tr. 723).

Contrary to the District Court's opinion (*e.g.*, Findings Nos. 15, 17, 18, 20, App. pp. 12a-14a), Grinnell is not a supplier of the other defendants. The uncontradicted evidence at the trial was that Grinnell does not sell sprinklers to the other defendants (GX 313; Tr. 693, 702); that sprinklers are independent of and not a part of CSPS equipment, although they may be protected by SSWF services (Tr. 690-93); that Holmes does not render SSWF services, and neither sprinklers nor SSWF actuating devices are used in connection with the services rendered by Holmes (Tr. 702); and that Grinnell does not supply any CSPS equipment to any of the other defendants (Tr. 693, 702, 722).

Grinnell's Stock Purchases

In 1949, Grinnell made its first acquisition in the CSPS field by purchasing a majority stock interest in AFA, a substantial stockholder of Grinnell (Tr. 696-97). AFA was and is engaged exclusively in rendering CSPS against fire hazards in the three cities in which it operates (New York, Philadelphia and Boston) where it provides SSWF services under a joint venture with ADT.

In 1950, Grinnell acquired from the New York Telephone Company all of the capital stock of Holmes, which was and is engaged in rendering CSPS exclusively against burglary and similar risks in the three cities in which it operates (New York, Philadelphia and Pittsburgh).

The reason for both these acquisitions, according to the trial testimony (Tr. 697-700) and contemporaneous documents (GrX J2), was to obtain for Grinnell a cushion against the effects of depression on its other income, which

is basically derived from sales of materials used in the construction industry.*

Grinnell thus had two subsidiaries engaged in rendering different forms of CSPS service in New York, Philadelphia, Pittsburgh and Boston. Then, in 1952, Grinnell was approached by The Western Union Telegraph Company, which offered to sell its 62% stock interest in ADT (GrX J49; Tr. 702-04, 706). Grinnell agreed to make this stock purchase for the same reason as it had purchased the stock of the other companies (GrX J5). Before the agreement was consummated, Grinnell received a letter from the Antitrust Division of the Department of Justice requesting certain information regarding it. Grinnell complied, and at the same time decided that it would abandon the transaction and forfeit its $625,000 deposit if the Department of Justice objected to it (Tr. 707-08).

Following discussions between Grinnell and the Department of Justice, Grinnell received a letter from the Department of Justice expressing thanks for Grinnell's information and cooperation (Tr. 709-10). The parties then concluded that the Department had found the transaction unobjectionable and consummated it.**

Because of its unfamiliarity with CSPS operations, Grinnell did not change the management or policies of any of the alarm companies in which it invested, nor did it participate in their operations (Tr. 507, 727-29, 733). The

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* Fluctuations in this income had caused Grinnell to omit dividends in the past (Tr. 697-98; GrX J75), and Grinnell's 1950 report to stockholders stated that the past earnings records of AFA and Holmes had "demonstrate[d] that they are engaged in about as depression-proof an industry as can be found" (GrX J2).

** Thereafter, Grinnell acquired sufficient further stock in ADT that it could have merged all three alarm companies, if it had so desired, into one company or into Grinnell, without obtaining the consent of minority stockholders.

former chief executive officers remained in charge ,in each case, and there was no interchange of personnel between or among any of these companies (Tr. 728-29). Apart from certain Grinnell executives becoming "outside" or "non-management" directors of the alarm companies, no Grinnell employee ever became employed by AFA, Holmes or ADT in any capacity (Tr. 729).

Proceedings Below.

The complaint was filed on April 13, 1961. Judge Day of the District of Rhode Island disqualified himself for personal reasons, and the case was assigned to Chief Judge Sweeney of the District of Massachusetts. Judge Sweeney, in turn, disqualified himself when he learned that Arthur D. Little, Inc., for which a relative of his worked, was conducting a market study for defendants.* Chief Justice Woodbury of the First Circuit then designated Judge Wyzanski, sitting as a judge of the District Court for the District of Rhode Island, to preside over this case.

Extensive pretrial discovery proceedings were conducted by both sides.** During 1963, defense counsel conferred with Government counsel in an effort to settle this case, and drafts of proposed consent decrees were exchanged. The defendants submitted their draft in September of 1963; on November 12, 1963, the Department submitted a counter proposal going far beyond the relief demanded in the complaint.

These negotiations and the progress of discovery proceedings were reported to the court at a pretrial conference

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* Like Judge Day, Judge Sweeney disqualified himself *sua sponte* without any request from any party.

** Over 8,000 pages of deposition transcripts were compiled, and defendants gave extensive answers to interrogatories and produced hundreds of thousands of pages of their documents for inspection and copying by the Government.

on December 18, 1963. At that time, Government counsel suggested a further pretrial conference after mid-February, 1964, for the purpose of obtaining rulings on objections made in the course of the depositions, as well as advance rulings on objections to documents which the Government intended to offer in evidence at the trial (Tr. 12/18/63, pp. 8-9).

Defense counsel suggested that the next pretrial conference might more profitably be devoted to considering the appropriate scope of relief, assuming *arguendo* the truth of the Government's charges, as recommended by the *Handbook of Recommended Procedure for the Trial of Protracted Cases,* 25 F. R. D. 351, 398. They suggested that such a discussion might well result in limiting the issues to be tried, or sharpening them so as to aid the court in considering the materiality of evidence offered, or might eliminate the need for trial entirely (Tr. 12/18/63, p. 16).

The court expressed agreement with that program and entered an order directing plaintiff to submit a brief containing the Government's views of the basis of liability of each defendant, together with "the text of the operative portions of the decree plaintiff would request in the event it prevails". Defendants were directed to submit answering briefs on the relief which would be appropriate if plaintiff prevailed, together with a proposed decree.

Briefs were exchanged as the court's order directed, and the pretrial conference on relief was set for May 28, 1964. However, on that day the District Court refused to consider the question of possible relief. The trial judge then commented in part:

> "* * * *You would do better to get together with the government rather than run the risk of what I would*

say from what I have seen. Let me just assure you of that. And I mean every word, and you can underline that four times." (Tr. 5/28/64, p. 9)

* * *

"* * * The trial is to begin on the 15th of June. There will be no delays. Nothing will prevent it except death or serious illness." (Tr. 5/28/64, p. 10)

On June 2, 1964, defendants filed a motion objecting to this peremptory trial date, which had not been requested by any party, and requesting 60 days rather than 18 days to make final trial preparations. At the same time, defendants moved for an order limiting the issues to be tried. The court denied both motions the following day, stating in part:

"The Court: Yes. I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial.[*] You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases. Is that clear?" (Tr. 6/3/64, pp. 19-20).

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* The court did not explain what "documents" it referred to here. The only documents before the court for purposes of the abortive pretrial conference on relief were briefs limited to 50 pages and proposed decrees. No documents had been offered or received in evidence, and defendants were not aware that the court had examined any. To the best of appellant's knowledge, the court could only have reference to excerpts from certain documents and deposition transcripts set forth in the plaintiff's Trial Brief, which had been filed prior to this time. Some of these were not received in evidence at the trial.

The court made it clear that any trial would result in a judgment for the plaintiff exceeding its demands, and that the court was not open to persuasion either on the issues of liability or relief. Under these circumstances, believing that it was impossible for them to have a fair and impartial trial, on June 9, 1964 defendants filed affidavits requesting that Judge Wyzanski disqualify himself from further proceedings herein.* He refused to do so but stated that defendants should make their application to Chief Judge Woodbury, who found "no adequate basis for concluding that Judge Wyzanski is disqualified".

The Trial.

The trial commenced on June 15, 1964, the date peremptorily set by Judge Wyzanski. Plaintiff commenced its case by offering 307 exhibits, in bulk, consisting of some 2,500 pages. Over defendants' objections, all were received in evidence without scrutiny. In answer to defendants' objection that no internal document of one defendant could

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* Grinnell's affidavit stated in part:

> "This motion is made with the greatest respect for this Court and the United States District Judge presiding. We have reluctantly concluded that it is our disagreeable duty to call the Court's attention to the state of mind in which it is about to judge defendants because due process requires that the trial be conducted by a judge who can and will accord defendants the presumption of innocence to which they are entitled. We deeply regret this turn of events because we do not believe the Court's attitude on the merits of this case, as reflected in its remarks on the record, has resulted from any bias or prejudice which existed prior to the Court's accepting assignment to this case in 1962, or even prior to this year. Instead, we believe the Court's convictions have resulted inadvertently from the very pretrial procedures defendants themselves proposed. Nevertheless, the fact remains that the Court's pre-judgment of this matter is tantamount to prejudice." (Petition and Affidavit of Clarence H. Rison, dated June 9, 1964, par 10.)

bind any other unless there was some independent proof of a conspiracy, the court ruled:

> "I am satisfied from my examination of the documents that a prima facie case has been made for the admissibility on the conspiracy theory." (Tr. 5)

At the time this ruling was made, no testimony had been taken, no exhibits had been received in evidence, and no examination of the documents offered had been made during the trial. Accordingly, there was no clue as to the identity of the "documents" which Judge Wyzanski found to be the independent connecting evidence.

Defense counsel presented memoranda indicating the nature of their individual objections to these 307 exhibits. The court had these marked as Defendants' Exhibits A and B for identification (Tr. 7, 8), and immediately ruled:

> "The 307 exhibits, Exhibits 1 to 307 for Identification inclusive, are admitted in toto, in accordance with the proffer. All objections are overruled." (Tr. 9)

Plaintiff then offered as exhibits five stipulations of counsel (which were received without objection) and concluded its case by offering in bulk excerpts from 38 depositions consisting of over 2600 pages of transcripts. Defendants had noted hundreds of objections (Defendants' Exhibit C for identification) and pointed out that the testimony contained quadruple hearsay (Tr. 25-6). On overruling all of these objections, the court observed:

> "To be sure, the making of such determination has some disadvantages for the defendants in that they cannot know whether something will or will not be excluded.
>
> • • •

> "The protection which the defendants will have is that they may be sure that on any vital matter in the case I shall not put in a mere summary method my findings, conclusions or judgment but, where appropriate or necessary, I shall key to particular documents or other exhibits or pages of the transcript such support as there may be for such findings, conclusions or judgment as I enter" (Tr. 28).

This "protection" of citations to the evidence relied on was not accorded in the findings and conclusions ultimately entered. No reference was made in them to any specific testimony or exhibit, nor is there any indication that the trial court eventually excluded any of the material offered by the Government.

These rulings were also interspersed with comments expressing the court's resentment of the defendants' motions to disqualify him, including:

> "The Court: I do regard your statements as both an offense and a reflection at an earlier stage because they are based upon the assumption that I gained information from some other source or other circumstances than by your demand that I should read these documents.
>
> "Mr. Fritz: May I——
>
> "The Court: You yourselves put on me the burden of forming an opinion and I did form one."
>
> • • •
>
> "The Court: You have made it quite plain to the country at large, or at least to this community, that you regarded me as having formed an opinion from some other way than a Judge ought to form an opinion.
>
> "Mr. Fritz: Well, I don't think it becomes me to make any comment except to say that what I submitted to this Court I did on the basis of only two matters, two excerpts of hearings before this Court, one, May the 28th and one, June the 3rd, and they were presented in full.

"The Court: They did not tell the whole story because over my strong reluctance you insisted that I should hold a case in suspense so that you could confer about a possible settlement and that I could look at the papers with respect to the matter. You, not I, created the difficulty. Any Judge would properly resent being drawn into a situation as a trap and then have the door let loose.

"Mr. Fritz: Well, I don't think it would serve any useful purpose on my part certainly—your Honor seems to have strong convictions about that—but let me just close it by saying that for my part, and I am sure for Mr. McInerney's part, we came here suggesting the use of the Handbook Procedure in the utmost of good faith thinking it would be of help. Now we may have been mistaken in that but that was what our motivation was.

"The Court: You proceeded to disqualify two Judges and sought to disqualify the third on the eve of a trial that had been postponed for nine months.

"Mr. Fritz: The disqualification of the two prior Judges was purely voluntary on their part and had nothing to do with any of us.

"Now with respect to the depositions that have been offered by the Government . . ." (Tr. 19-21).

The Government's case was concluded with the admission of the deposition excerpts about an hour after the trial had commenced. The court confirmed that all evidence offered by the Government had been admitted (Tr. 40), denied motions to dismiss (Tr. 39-40), and proceeded to hear the defense. The three alarm companies put in their evidence in four trial days, and Grinnell's defense concluded the trial on June 24, 1964.

James D. Fleming, President of Grinnell, was its only witness. He described the business of Grinnell, its reasons for purchasing stock in AFA, ADT and Holmes, and the

operation of those companies after their acquisition (Tr. 686-738). He was not cross-examined by the Government.

His examination was, however, interrupted by extensive comment from the court, including the following:

> "The Court: Mr. Fleming, I mean this as a compliment and not otherwise. I am deeply impressed with your familiarity with the company and your clarity of presentation and, if I may say so, your obvious strength of mind.
>
> "What I would like to know is whether you have any associates who, with all due modesty, you can tell me are comparable. For I have the very definite impression that if I ever saw a company which was in the control of one Napoleon, I am seeing it now.
>
> "The Witness: I'm sorry—?" (Tr. 729-730).
>
> • • •
>
> "The Court: I hope you realize I do not mean anything adversely critical. On the contrary. If I may say this without regarding myself as flattering you, the kind of quality that you have is rare and admirable" (Tr. 734).

The Decision Below.

The introduction to the trial court's opinion is devoted to making "explicit certain aspects of its approach to this controversy", including:

> "This Court is mindful that in recent years antitrust litigation • • • have involved an enormous, nearly cancerous, growth of exhibits, depositions, and *ore tenus* testimony. Few judges who have sat in such cases have attempted to digest the plethora of evidence • • •.
>
> "• • • most of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market

as to have the power to exclude competition therefrom, there was a *rebuttable* presumption that such power had been criminally acquired and was a monopolizing punishable under §2.

"* * * non-statutory monopolies * * * are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1" (App. pp. 4a, 6a-7a).

The court then announced the rule that once the Government has shown that a defendant has a "predominant" share of the relevant market, the defendant has the burden of proving that "its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial' " (App. p. 7a).*

The unsupported and erroneous findings and conclusions upon which the District Court rested its decision will be considered hereafter. After reciting them, the court then held that Grinnell's acquisition of stock in the alarm company defendants and its subsequent "direction" of their policies (neither of which were expressly challenged by the complaint) violated Section 2 of the Sherman Act. While the court's opinion does not state that Grinnell had violated Section 1, its final decree does (App. p. 35a).

The "Opinion on Liability" simply reiterates certain of the court's convictions, such as: "Unless he maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned", and "All that is at stake here is the rooting out of a plant of minor importance in the rich forest of the American economy" (App. pp. 28a, 30a).

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* At no time prior to the publication of this opinion were the defendants advised of the court's view that they had this burden of proof. No such contention was made by the Government.

The "Opinion on Remedy" provides for a decree imposing on Grinnell the following restrictions—each of which, we respectfully submit, is unwarranted:

(a) Grinnell is directed to "cease and desist from restraints of trade in which the record shows that the alarm companies have engaged".

(b) All defendants are enjoined from acquiring the stock, assets or business of enterprises engaged in CSPS.

(c) Grinnell must, no later than April 1, 1966, file a plan of divestiture disposing of all its stock in each of the alarm companies.

(d) All defendants are enjoined from continuing to employ Mr. Fleming in any capacity after April 1, 1966* (App. pp. 32a-34a).

The opinion concludes with a paean of qualified praise for Mr. Fleming's honesty and integrity (App. p. 34a).

The Questions Are Substantial.

The issues raised by this appeal are substantial and of great importance, not only to the parties but to the administration of justice generally and to the administration of the Sherman Act in particular. The major issues are outlined below.

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* The court stated in this section of its opinion that Mr. Fleming "cannot have been ignorant" of the antitrust violations which the court found and that defendants had "[f]ull notice that this Court contemplated this decretal provision * * * during the trial." The only notice that the court could have been referring to was in its remarks during the testimony of another witness (Mr. O'Brien of ADT, at Tr. 574-575) and again after both sides had rested (Tr. 742-743). At no time was there any indication that these comments applied to Mr. Fleming, and accordingly the subject was not even briefed by Grinnell.

I.

The District Court did not accord defendants a fair trial but prejudged this case adversely to defendants on the issues of both liability and relief.

Before the trial commenced, and before any evidence had been received, Judge Wyzanski had formed a conviction adverse to defendants on the merits of this case. He advised them they "would do better to get together with the government" than risk what he would do after a trial (Tr. 5/28/64, p. 9).

While he refused to specify the relief he had in mind, the trial judge had previously indicated that he was capable of imposing "Draconian measures of great severity" (Tr. 12/18/63, p. 23), and he made it plain that his decree would go beyond what the Government had demanded, which in turn was far in excess of the prayer for relief in the complaint.*

As noted above, at the very commencement of the trial (before any evidence had been taken) the court proclaimed itself satisfied that a *prima facie* case of conspiracy had been made out (p. 12 *supra*). The court also expressed its resentment of the motion to disqualify and its impatience with defendants' desire to have the Government's evidence carefully scrutinized.

For example, the trial was marked by such shortcuts as receiving *en masse,* over defendants' objections, all evi-

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* For example, the complaint sought to have Grinnell divested of ADT, and to require the alarm companies to *offer* title to protection devices to their subscribers. The Government's "settlement offer" demanded that Grinnell divest itself of all *three* alarm company subsidiaries, and that they must *require* their subscribers to take title to their protection devices regardless of the financial hardship to defendants and their subscribers (see Plaintiff's Proposed Form of Judgment, filed February 14, 1964, pp. 6, 7).

dence offered by the plaintiff (over 2,500 pages of documentary exhibits and 2,600 pages of excerpts from 38 depositions) without giving individual consideration to any of defendants' objections at the trial. When objections were made to excerpted deposition testimony (the last of the exhibits offered by the Government) the court gave a general discourse on the rules of evidence (Tr. 26-37) and then overruled all objections with the following remarks:

> "I am not doubtful as to the general admissibility of the depositions as a whole. They are offered for particular points which it would take me a year to determine with a fine tooth comb, but I have no intention of engaging in a fine tooth comb process except where I finally decide that an item has such potential relevance and admissibility as by some chance being likely to influence me." (Tr. 36)

The remainder of the trial was largely a formality, interspersed with comments by the court to defense counsel, such as the following:

> "Now, you, of course, are free to build the record hoping that some other more enlightened judge will have a more sympathetic view. I am not saying that in any other sense than telling you that I know where I come out not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment." (Tr. 140)
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> • • •
>
> "Maybe you will persuade somebody else. And if you think so, all right. I just assure you *it is a great ceremonial act, as far as I am concerned.*" (Tr. 143-44; emphasis supplied)

The defendants concluded their case on June 24 and the Government offered no rebuttal testimony. The trial

judge then advised the parties that they would have until the following Fall to file post-trial briefs limited to 50 pages in length with appendices of unlimited length. Grinnell filed such a brief, as did all parties. However, the court's opinion does not refer to any of the legal arguments or the various decisions of this Court cited by Grinnell in its brief; instead, it contains major errors regarding uncontested facts stressed in Grinnell's brief.*

Perhaps the most striking evidence of the extent to which the decision below resulted from convictions formed before the trial commenced, and from resentment of the motion to disqualify, is to be found in the findings which the court ultimately made. Those findings are to an extraordinary degree unsupported by, inconsistent with, or flatly contradicted by, the record in this case. Rather than reflecting the facts, they reflect the court's expressed reluctance to "digest the plethora of evidence" (App. p. 4a) or "engag[e] in a fine tooth comb process" (Tr. 36).

Moreover, in framing his decree, Judge Wyzanski gave content to his allusion to "Draconian measures" by imposing "relief" going far beyond anything the Government had demanded even in the punitive demands it later added to those in the complaint. His decree would, in effect, outlaw Grinnell from the CSPS business by divesting it of all its present investments therein and enjoining it from future acquisitions. Since Grinnell has never been in the CSPS business, and has neither the facilities nor the per-

* For example, the court's critical finding that "Grinnell manufactures alarms and other equipment which it supplies to the alarm company defendants" is not only clearly erroneous, but is an error which could easily have been avoided by anyone who read pages 6-8 of Grinnell's post-trial brief of September 11, 1964 (demonstrating that there is no horizontal or vertical integration between Grinnell's business and the business of the alarm company defendants). Moreover, the Government did not contend that Grinnell was supplying the other defendants with anything.

sonnel to begin any such operations, it is no comfort that the lower court would permit "internal growth", admonishing:

> "External growth is the badge of the monopolist, as internal growth is the mark of the free life." (App. p. 33a)

Similarly Draconian was the court's injunction barring defendants from continuing to use the services of Mr. Fleming in any capacity.

By these extraordinary and unprecedented measures, the court below made good its pretrial threats that defendants would do better to capitulate to the Government's demands than to insist on their day in court.

We respectfully submit that, considering all of these facts (from the trial court's announced prejudgment of this case, to its conduct of the trial, to its unsupported findings and its excessive decree) the interests of justice require that the trial below be set aside and a new trial ordered. A trial in which the Judge states at the outset the conclusion he will reach and which thus becomes "a great ceremonial act" is plainly repugnant to basic principles of due process of law.

II.

There is no support in the record for the District Court's holding that Grinnell violated Section 1 of the Sherman Act.

Although the District Court's opinion does not specify any basis for the decree that Grinnell violated Section 1 of the Sherman Act, that determination appears to have been based on the "Fire Alarm Agreements of April 29,

1907" which "lapsed" in 1954.* The court held that, in entering these Agreements in 1907, ADT, AFA and their predecessors in interest committed *per se* violations of Section 1 by allocating markets and customers among themselves. While these agreements are "now admittedly several decades old and formally no longer effective", it concluded that defendants have "continued most of the arrangements once founded on those unlawful legal instruments" (Conclusion of Law 2, App. p. 26a).

Copies of these Fire Alarm Agreements were part of the material submitted by Grinnell to the Department of Justice in 1953 when Grinnell had already acquired its stock interest in AFA and Holmes, and the Department was considering Grinnell's proposed acquisition of 62% of ADT's stock (GrX J76, p. 6). When the Department did not object to either the agreements or the acquisition, Grinnell acquired the ADT stock and the Fire Alarm Agreements were allowed to expire the following year.

When they were executed in 1907, it is doubtful that these agreements were even considered within the purview of the Sherman Act because of the intrastate character of the

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* Finding 53, App. pp. 24a-25a. The opinion also refers to two other agreements, neither of which could afford any basis for this holding. One is the "Burglar Alarm Agreement" of 1906 between ADT and Holmes (Finding 52, App. pp. 23a-24a). Grinnell was never a party to that agreement; it was terminated in 1947, three years before Grinnell acquired any interest in either party, and there is no evidence that Grinnell even had any knowledge of it at any time prior to this suit. The only other agreement mentioned is one involving Grinnell, ADT and the Rhode Island Electric Protection Company. The opinion describes that agreement as "admittedly * * * a mere make weight" (Finding 54, App. p. 25a), and at the trial defendants stated that they were negotiating a termination of that agreement (Tr. 504).

CSPS business,* and because they were entered into as a part of a joint venture among the parties to resolve patent conflicts and to enable an infant industry to get started.**

While agreements to allocate territories among competitors are normally unlawful, such agreements have been upheld when ancillary to otherwise lawful business transactions, or justified by supervening economic or political requirements. *E.g., Pan American World Airways, Inc.* v. *United States,* 193 F. Supp. 18 (S. D. N. Y. 1961), *reversed on other grounds,* 371 U. S. 296 (1963). Yet the court below made no effort to determine whether, during the period when these agreements were in existence, they were justified by considerations relating to the infancy of the central station alarm industry, the resolution of patent rights, or other factors. *Cf., United States* v. *Jerrold Electronics Corporation,* 187 F. Supp. 545 (E. D. Pa. (1960), *aff'd,* 365 U. S. 567 (1961).

Even apart from these other considerations, the vital fact that the trial court overlooked is that the parties to these old agreements are now all in the same corporate family. Even if these agreements had created "patterns" or "folds in the industrial scene" (and even if the Sherman Act prohibited "patterns" and "folds" rather

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*Even today, central stations are necessarily local businesses which are limited to providing protection services within 25 miles of the central station (Finding 3, App. pp. 8a-9a). We submit that such a business would not have been considered to be interstate commerce under the case law at that time, even if it would be today.

** During trial, defendants served the Government with a notice to admit the existence in 1907 of patent conflicts, among the various parties to the 1907 agreements, of such complexity that the practice of any one party's patents in rendering SSWF "would have entailed infringement or substantial risk of infringement" of the other parties' patent art, so that each party needed a license under the others' patents to employ even its own patents "without substantial risk of infringement—and attendant litigation". The Government did not deny any of these matters, and the trial court ruled that they "stand as admitted except insofar as they are denied" (Tr. 355).

than combinations and conspiracies*) these "patterns" and "folds", insofar as they now exist, are all made from the same whole cloth of a common enterprise.

Prior to the termination of the Fire Alarm Agreements in 1954, Grinnell held a large enough percentage of the stock of both ADT and AFA to dissolve them or to merge them into itself if it so desired.** Thus the alleged restraints that the court was referring to in these lapsed agreements (*i.e.*, allocating territories and functions) were restraints on potential competition between these two alarm company subsidiaries in a field in which their parent, Grinnell, did not compete. Since there is no legal requirement that compels subsidiaries to compete among themselves or with their parent, the contention that these lapsed agreements left "folds in the industrial scene" is wholly immaterial.

The arrangements here (even if they had survived) were not in any way comparable to those found in cases involving restraints on third parties. (*E.g., Schine Chain Theatres* v. *United States,* 334 U. S. 110 (1948), and *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211 (1951), where predatory conspiracies against outsiders were found.) As the Attorney General's National Committee to Study the Antitrust Laws observed:

> "* * * To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare. "* * * Nothing in these opinions should be interpreted as justifying the conclusion that concerted action

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* *Cf., Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.,* 346 U. S. 537 (1954), holding that conscious parallelism of itself does not violate Section 1.

** In addition, of course, Grinnell has owned 100% of the stock of Holmes since 1950.

> solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1." (Report, p. 34)*

The only other conduct to which the trial court adverted in connection with its Section 1 conclusions was that the alarm company defendants "manipulated their own prices to forestall competition". There is no finding that defendants conspired or cooperated in any way in this alleged "manipulation", and no finding that Grinnell in any way engaged in such practices or was even aware of them. The court was discussing individual alarm company activities for which Grinnell cannot be held vicariously liable. Moreover, at most the conduct condemned amounted to an intra-enterprise "conspiracy".

The court's finding with respect to this so called price manipulation was, in any event, insufficient to support a conclusion that Section 1 had been violated by anyone. The only relevant finding is that the alarm company defendants had departed in some instances, and in different ways, from their schedule of minimum basic service charges (Finding 55, App. pp. 25a-26a). On the other hand, the court found that defendants' market position was declining, and that no competitor was prevented from entering, or was driven out of, the market (Finding 45, App. p. 20a). No case has been found in which this or any other court has held that a departure from a party's standard prices is a

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* In such circumstances, the Department of Justice has recognized in several consent decrees that restraints within the corporate family (or between one company and another in which the first company has over 50% of the stock) are not unreasonable. *E.g., United States* v. *United Fruit Co.*, 1958 CCH Trade Cases ¶ 68,941 (E. D. La. 1958); *United States* v. *Blaw-Knox Co.*, 1954 CCH Trade Cases ¶ 67,750 (W. D. Pa. 1954); *United States* v. *Standard Oil Company (New Jersey)*, 1960 CCH Trade Cases ¶ 69,849 (S. D. N. Y. 1960).

per se violation of the Sherman Act. Instead such departures would seem to be indicia of competition.

III.

The District Court erroneously created a new definition of monopolizing and vicariously applied it to Grinnell.

While purportedly announcing a rule of procedure, the District Court also adopted a vastly expanded definition of "monopolizing", under which control over prices and the exclusion of competitors, which have been the tests of monopoly power prescribed by this Court,* are superseded.

The lower court conceded that competition of other alarm services prevents defendants from controlling prices even in those cities where they have no "relevant market" competition (Finding 46, App. pp. 20a-21a); that there was no persuasive evidence of exclusion of any existing or new competitors from the market,** and that the *most* the evidence showed was that "some competitors complain of what they regard as unsatisfactory profits" (Finding 45, App. p. 20a), and that defendants' market share has been declining (Finding 45, App. p. 20a).

Despite these facts, the District Court proclaimed the rule, allegedly awaited by the "cognoscenti", that it suffices to establish a criminal violation of Section 2 if a defendant occupies a "predominant" share of the designated market and is unable to prove its innocence of such a violation.***

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* *E.g., American Tobacco Co.* v. *United States,* 328 U. S. 781, 811 (1946); *United States* v. *E. I. duPont de Nemours & Co.,* 351 U. S. 377, 391 (1956).

** In fact the number of CSPS firms has been increasing (Tr. 496; GX 305).

*** The presumption which the court employed was clearly labeled as not merely a shifting of the burden of going forward, but a shifting of the burden of proof (App. p. 6a).

To shift to a defendant the burden of justifying its position merely upon a showing by the Government that the defendant has a "predominant" share of the allegedly relevant market is an extraordinary gloss on Section 2 of the Sherman Act, particularly in a case where the indicia of monopoly power which this Court has traditionally held decisive have been negatived by specific findings. It has never previously been suggested, so far as we are aware, that rules of *per se* illegality have any place under Section 2.*

The District Court seems to have based its ruling on two considerations: the experience acquired by courts in "dozens" of monopoly cases, and the need for sparing judicial time for devotion to other matters. Neither will justify the result. To presume, on the basis of court decisions, that lawfully acquired monopoly is "a *rara avis* more often found in academic groves than in the thickets of business" (App. p. 6a) is like formulating "laws" concerning the general health of the population on the basis of a sample composed of hospital patients.

Nor can the District Court's concern with reducing the time required for the trial of antitrust cases justify transferring the burden of proof to the defendant on so limited a showing by the Government. Fair trials may well be time-consuming. They may even require the appointment of more judges, or better distribution of the judicial work load, or some other remedy. But the remedy cannot be in shifting the burden of proof to the defendant.

After announcing this new presumption, the court held it was irrebuttable in this case because the defendants could

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* On the contrary, this Court has recently emphasized the care with which *per se* principles are to be evolved in areas where they have not previously been applied. *White Motor Co.* v. *United States*, 372 U. S. 253 (1963).

not, in any event, sustain the burden of justifying their "predominant" share of the market. The reasons relied on by the court to support such a conclusion are curious indeed.

The court purported to find some evidence of monopolization by all defendants in the fact that ADT operated "20 *deficit* offices in cities with no other central station" (Finding 47, App. p. 21a). This finding concerns only ADT and hardly shows that Grinnell was guilty of monopolization. It is, in any event, difficult to see how such a finding tends to prove monopolization by anyone, or to prove anything other than the existence of real competition, even in the so-called "monopoly" towns. If the operation of such offices has any relevance to the question of monopoly power, it would seem to disprove, rather than prove such an allegation, since a monopolist can presumably set his prices at a level which will make it unnecessary for him to lose money.*

The only other basis for the court's conclusion that defendants could not bear the burden of showing that they were innocent of a Section 2 violation was its reference to two small acquisitions by ADT within the relevant market (Finding 49, App. p. 22a) and some additional acquisitions by ADT outside the relevant market (Finding 50, App. p. 22a). Not only were none of the acquisitions relied on made by Grinnell, but there is nothing to indicate that the ADT acquisitions significantly enhanced its position in the allegedly relevant market.

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* The court found "no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business" (App. p. 20a); nor did it find any evidence that prices were kept artificially low in these 20 cities for any such purpose.

IV.

The District Court erred in concluding that "accredited central service protective systems operated by largely automatic devices" was the relevant market.

The impact of the "*per se* monopolization" principle which the trial court devised was accentuated by the court's narrow view of the relevant market. By defining the market as the narrowest identifiable one, the court found that the percentage share attributable to defendants was predominant and that this brought its "presumption of guilt" into play.

The lower court's findings as to the market concentrate on demonstrating that "accredited central service protective systems operated by largely automatic devices" (App. p. 18a) may be considered a distinct kind of burglar and fire protection.* The court acknowledged the cross-elasticity of demand between this service and other protective systems, but then ignored that consideration in determining the relevant market. In a Section 2 case, that consideration is vital. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 394 (1956).

The lower court recognized that for the person desiring burglar or fire protection the alternatives to accredited CSPS include other forms of electric protection devices (*e.g.*, unaccredited CSPS, alarm systems connected to local police or fire stations, and automatic proprietary systems confined to one site) as well as other protective systems

* The superficiality of the court's treatment of the relevant market problem is exemplified by the statement that "markets for services rendered without tools and without education in the handling of them differ *toto mundo* from markets for services related to machines" (App. p. 16a). Apparently the court would regard the market for unarmed watchmen as separate from the market for watchmen with guns.

(*e.g.*, those employing watchmen, patrol service, and the like). It also recognized that a single business sometimes exercises its option among these alternatives differently for different sites in the same city (Finding 12, App. p. 11a), and that these other services effectively keep defendants from obtaining their "minimum basic rates" even where there is no accredited CSPS competition (Finding 46, App. pp. 20a-21a).

The significance of the court's failure to take any of these other services into account is quite clear. If the relevant market here includes all electric protection devices, defendants may have as little as 36 per cent of that market (Tr. 676). If it were to include other protective systems as well, defendants' position would be even less (See Tr. 671-675). In neither case could defendants be said to have a predominant market share.

Under these circumstances, the court's uncritical acceptance of the relevant market alleged by the Government, coupled with its announcement that this shifted to defendants the burden of proof, constituted prejudicial error.

V.

The District Court erroneously held Grinnell responsible for the acts of the other defendants.

We have already seen that the trial court ignored the individual corporate entities of Grinnell and the other defendants in making its basic findings.* It is, of course, well settled that Grinnell's stock holdings in the other

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* For example, in Finding 47 (App. p. 21a), the court concluded that *ADT's* operation of 20 deficit offices "conclusively proves that *defendants* enjoy national monopolistic power"; and subsequent findings argue that *ADT's* acquisitions "within and outside the relevant market" (48-50, App. pp. 21a-22a) prove that "*defendants* have not borne, and cannot bear, their burden of showing" they did not violate Section 2 (Finding 51, App. p. 23a; emphasis supplied).

defendants do not *ipso facto* render it responsible for their acts. *Hartford-Empire* v. *United States,* 323 U. S. 386, 403, 405 (1945); *National Lead Co.* v. *Federal Trade Commission,* 227 F. 2d 825 (7th Cir. 1955), *rev'd on other grounds,* 352 U. S. 419 (1957). The theory upon which the opinion below seeks to justify holding Grinnell responsible is contained in a series of findings (21-26, App. pp. 14a-16a) from which the court apparently draws the conclusion that Grinnell, through Mr. Fleming, so managed and directed the operations of the other defendants that their separate corporate entities may be disregarded and the acts of any defendant may be attributed to all of the others.* Yet at no time before or during the trial were defendants given any notice that either the Government or the court would seek to rely on any "alter ego" or other theory for "piercing the corporate veil".

The court's analysis commences with the concession that: "Grinnell's relations to ADT, AFA, and Holmes are in a formal sense so structured that each of the affiliates of Grinnell had separate officers, and separate boards of directors which have independent identity", but then states that "the form is not a true mirror of the substance" (Finding 21, App. p. 14a). That conclusion is based on the following series of assumptions and assertions.

(a) "Since 1919[**] the balance sheets of Grinnell, submitted as part of Grinnell's reports to its stockholders,

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* Nevertheless, the court seemed to rely on the separate existence of these corporations in support of the conspiracy theory on which documents pertaining to only one defendant were admitted as against all the defendants (Tr. 5).

** Grinnell acquired its controlling interest in AFA in 1949, in Holmes in 1950, and in ADT in 1953 (Tr. 696-710). Presumably the court meant to refer to either 1949 or 1953. The source of the "1919" figure appears to be a typographical error at page 689 of the transcript (later corrected by a motion to correct the transcript consented to by all parties). (See, also, GrX J-75.)

have shown, though in unconsolidated form, the results of the operations of all 4 defendants" (Finding 21a, App. p. 14a). The testimony was that these three subsidiaries were not consolidated with the rest of Grinnell's business because they are in a "foreign line of business" and "are carried on our balance sheet as merely an investment" (Tr. 688).

(b) Since 1948, Mr. Fleming has been President of Grinnell; his candid testimony during the trial shows that he is a man of "competence, character, and force of leadership" (Finding 22, App. p. 14a).

(c) Mr. Fleming sits on the board of directors of each of the alarm companies and is Chairman of the Board of ADT. "In only one instance that Mr. Fleming could recall, has a board of directors of one of the affiliated defendants ever vetoed, or rescinded, or overridden any of his or Grinnell's management proposals or plans" (Finding 23, App. pp. 14a-15a).

The only thing remotely resembling this finding in the record is Mr. Fleming's testimony which is precisely to the contrary. It occurred after the following colloquy.

> "The Court: * * * The word Napoleon has, of course, a pejorative or unfavorable aspect. I did not mean that. What I meant was that kind of ability which rarely emerges but always carries with it command.
>
> "The Witness: Thank you, sir.
>
> "Q. I would like to ask you one further question in connection with this. Since you and the other Grinnell men have been sitting on the Boards of Directors of these [alarm] companies, do you recall any instance where the Board of Directors has vetoed or rescinded or overridden any management proposal or plan?

> A. We had one instance in ADT. It was a question of whether ADT was to go ahead with a central station in Paris, France. Mr. O'Brien [President of ADT] and Mr. McDonald [Vice Chairman of ADT's board of directors and principal fiscal officer of ADT] voted against it. Mr. Gaston [retired President] and the rest of the Directors voted for it. And we are going ahead with it as rapidly as possible. But that is the only instance I know of" (Tr. 734-35).

In other words, Mr. Fleming's testimony was that in only one instance had the alarm company directors (elected by Grinnell) ever vetoed, rescinded or overridden any proposal made by the (non-Grinnell) management of any of *the alarm companies.* In that instance the non-Grinnell "operating" or "management" directors were divided with respect to the proposal.

This testimony was confirmed by that of Mr. McDonald, an ADT executive and employee for forty-three years, who was familiar with its operations both before and after Grinnell acquired ADT stock. He testified that Grinnell made no change whatever in the management or operations of ADT (Tr. 506-507), because "Grinnell did not know the operations of ADT. It relied strictly upon its officers to run the business" (Tr. 507).

The uncontradicted testimony is that Mr. Fleming and Grinnell gave the alarm company subsidiaries an unusual degree of autonomy, for two reasons: first, because they were in a service business entirely foreign to the sales of plumbing products which constitute Grinnell's basic business, and, second, because AFA and ADT had minority stock interests (Tr. 727-729).

(d) The court also found that the "personnel unity achieved through the dominant character of Mr. Fleming" was buttressed by the 1907 Fire Alarm Agreements

(entered into before Mr. Fleming joined Grinnell) because Grinnell received revenues as a result of those agreements as late as 1960 (Finding 24, App. p. 15a). These are the 1907 agreements which lapsed in 1954, and to which Holmes was never a party (Findings 51a, 53, App. pp. 23a-25a).

(e) There is a "generic similarity" in the contract forms, price lists and instruction forms used by the alarm companies (Finding 25, App. p. 15a). While there are in fact many differences, any "generic similarity" of contracts and forms providing for similar services is not surprising.

(f) Traveling executives and written communications "produce a high degree of integration" of major policies of the alarm company defendants and "[result] in effective control by Grinnell and by Mr. Fleming of all 4 defendants, their company subdivisions, their district sales offices, and their personnel" (Finding 26, App. pp. 15a-16a). This conclusion from the alleged movement of documents and personnel across state lines (but apparently *within* each of the four corporate entities here involved) is simply a *non sequitur,* and no more probative of the court's conclusion than any of the other assumptions and allegations described in (a) to (f) above.

The fact is that neither Mr. Fleming nor any other Grinnell executive participated in the business of the alarm companies in any way other than to act as a member of the board of directors. The record simply will not support the assertion that any Grinnell executive participated in the management or operations of the alarm companies, their subdivisions, district sales offices, or personnel.

In short, the court's findings of fact turn the facts of record inside out in attempting to sustain taxing each

defendant with all other defendants' conduct, and concluding that the conglomerate is an evil combination which must be extirpated.

VI.

The remedies imposed by the District Court are punitive and wholly inappropriate.

Perhaps the most extraordinary feature of the lower court's disposition of this case is the remedies it chose. These are not only beyond the demands of the complaint, but are unprecedented, punitive and unrelated to any finding of unlawful conduct which could possibly be justified by this record.

It seems well settled that remedies in civil antitrust actions should be remedial rather than punitive, that unlawful conduct should ordinarily be remedied by an injunction tailored to prevent its continuance, and that remedies such as divestiture should be employed with restraint and only when required to eradicate an evil found to exist.

We have already outlined the drastic relief imposed in this case. The most startling of these provisions is the one enjoining Mr. Fleming's continued employment by the company which he has been serving since 1919.* So far as we can discover, no comparable decree has ever been sustained.

While any decree making it unlawful for an individual to pursue lawful employment to which he has devoted a lifetime would be of doubtful validity, this one is wholly unjustified for other reasons as well. This "relief" is unsupported by any evidence, and rests only on speculations

* This facet of the decree resulted in its having an even greater impact on Grinnell and on Mr. Fleming personally because of attendant newspaper publicity.

contrary to the evidence. Moreover, while running in form against the corporate defendants, it is, in effect, a punitive sanction on an individual who is not a party to this action, and who had no opportunity to defend himself. Thus, in this case we need not reach the question of whether any such decree could ever be justified (which, we submit, it could not).

A principal basis for Judge Wyzanski's conclusion that this remedy should be imposed appears to be his impression, apparently based on Mr. Fleming's demeanor on the stand, that Mr. Fleming is a man of "competence, character, and force of leadership" (Finding 22, App. p. 14a). It would be an extraordinary proposition indeed that whenever a company headed by a competent and forceful executive is found to have violated the antitrust laws, the decree should include a provision barring that executive from further employment.

We respectfully submit that, by this decretal provision, the trial court clearly usurped the prerogatives of Grinnell's stockholders to choose the management of their company.

The trial court attempted to buttress its speculations and impressions with findings which (as we have already seen, *supra,* pp. 33-36) are flatly contradicted by the evidence. In point of fact, there is no evidence whatever that Mr. Fleming was responsible for any unlawful course of conduct. Nor is there any reason to believe that any company employing him would be likely to flout the court's decree.

Other provisions of the lower court's decree would in effect outlaw Grinnell from the relevant market. These are apparently founded on the clearly erroneous impression of the trial judge that Grinnell is a principal supplier to the alarm companies. In addition, they go far beyond any

relief that would be appropriate even if that impression had been well founded.

It is clear from the record in this case that the affiliation between Grinnell and the other defendants involves neither vertical nor horizontal integration. As the court indicated, Grinnell is not and never has been in the central station protective service business. Contrary to the court's findings, there is no evidence that Grinnell supplies any of the other defendants with any products (see pp. 5-7, 21n, *supra*). Thus Grinnell's investment in the CSPS field cannot possibly be found to diminish CSPS competition or to foreclose any manufacturer from supplying the equipment used in providing CSPS.

Even if we were to assume that some separation of the alarm company defendants is necessary to prevent restraint or monopolization in supplying central station protective service (and we submit that no such showing has been made on this record), surely that separation could be achieved without divesting Grinnell of *all* of the alarm companies, and without completely proscribing Grinnell from a stock interest in any company providing such service.

The fact that the trial court did not consider any alternatives, but ordered triple divestiture and an injunction against re-entering the CSPS business by any acquisitions, is a further indication of how excessive the decree is as "relief" from any violations of the antitrust laws that might conceivably have been found to exist.

These provisions, as well as the insertion of a vague prohibition against "further restraining trade" and "further attempting to monopolize", further exemplify the failure of the trial court to take a judicious view of the issues here, either with respect to liability or with respect to relief.

Conclusion.

It is respectfully submitted that this case presents substantial questions as to what constitutes a fair trial, as to the procedure to be followed in antitrust cases, as to the interpretation of the applicable statutes, and as to the appropriate remedies to be decreed when violations are found. For all of these reasons, the case is worthy of review by this Court and probable jurisdiction should be noted.

Respectfully submitted,

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